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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Petition for Declaratory Ruling to Declare Unlawful Certain RFP Practices by Ameritech

CC Docket No. 98-62

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

Pursuant to the Commission's Public Notice (DA 98-849) released May 5, 1998, SBC Communications Inc. ("SBC") hereby submits its reply comments in the above-entitled matter on behalf of itself and its affiliates. The comments that were filed supporting the Petition of Sprint Communications Company, L.P. ("Sprint") provide no basis for the Commission to grant Sprint's petition.[1] The supporting comments incorrectly equate section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act") with the AT&T Modification of Final Judgment ("MFJ"), mischaracterize other provisions of the Act, misstate the terms of Ameritech's agreement with Qwest Communications Corporation ("Qwest"), mischaracterize the public interest impact of teaming arrangements like that between Ameritech and Qwest, and attempt to induce the Commission to issue an order much

[1] Comments supporting Sprint's petition were filed by AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI"), Association for Local Telecommunications Services ("ALTS"), McLeod USA, Incorporated jointly with Focal Communications corporation, ICG Communications, Inc., and KMC Telecom, Inc. ("McLeod"), e.spire Communications, Inc. ("e.spire"), Time Warner Communications Holdings Inc. ("Time Warner") and Telecommunications Resellers Association ("TRA"). Opposing comments were filed by US West Communications, Inc. ("US West"), and BellSouth Corporation with BellSouth Telecommunications, Inc. ("BellSouth"), as well as SBC. Ameritech Corporation ("Ameritech") filed a Motion to Dismiss.

broader than could be justified by the facts even if their characterization of the Ameritech/Qwest deal was accurate.

I. THE SUPPORTING COMMENTS ERRONEOUSLY EQUATE SECTION 271 WITH THE MFJ

Just as Sprint did in its petition, the supporting comments attempt to persuade the Commission that section 271 is simply a codification by Congress of the MFJ's interLATA prohibition. Time Warner boldly states that the MFJ's interLATA prohibition was "codified without modification in Section 271" while TRA says that "Section 271 codifies the . . . MFJ prohibition on BOC provision of in-region, interLATA services."[2] Others make similar arguments: e.spire says that section 271 "contains the same operative language, incorporates the same definition of the 'provision' of interLATA services"; McLeod says that section 271 "continues . . . the interLATA prohibitions of the MFJ" and that "Congress used exactly the same word - 'provide' - that the MFJ construed;" MCI says "Congress left this basic line-of-business restriction in the Act, word for word, . . . adopting the terminology of 'provide' from the MFJ."[3]

These statements simply are not correct. As SBC pointed out in its comments, the words, not just "provide" but all of the words, in the underlying definitions that establish the interLATA prohibitions in the MFJ and in section 271, must be examined, and when they are examined it is clear that they are not the same, "word for word".[4] Because the words used, and how those words are interrelated by Congress in the Act, are different, it is not appropriate to simply overlay the various interpretations of the MFJ onto section 271. As US West points out, Congress did not codify the MFJ, it

[2] Time Warner Comments at p. 3; TRA Comments at p. 3.
[3] e.spire Comments at p. 5; McLeod Comments at p. 9; MCI Comments at p. 9.
[4] SBC Comments at pp. 2-4; see also US West Comments at pp. 4-6.

eliminated the MFJ, and established a new process for administering a new federal policy.[5] Arguments that the Act codified the MFJ are not consistent with this Congressional action.

Furthermore, when Congress intended to adopt as part of the Act a provision or requirement of the MFJ with its attendant interpretation, it did so very clearly. This occurred, for example, in section 251(g) in carrying forward the pre-existing equal access requirements (". . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission"), and in section 273(h) in defining manufacturing (" . . . the term 'manufacturing' has the same meaning as such term has under the AT&T Consent Decree"). Surely if Congress had intended to do the same thing with respect to the interLATA prohibition, it would have said so.

Certain of the commenters also attempt to support their arguments about section 271 and the MFJ by references to other sections of the Act, specifically sections 272 and 274. These attempts are fruitless. MCI argues that if marketing were not included within the definition of provision, there would have been no need for Congress to include section 272(g)(2) in the Act, because section 272(g)(2) gives BOCs permission to market and sell the services of their section 272 affiliates.[6] MCI misunderstands

[5] US West Comments at p. 5.
[6] MCI Comments at pp. 8-9.

section 272(g)(2). That provision is a timing provision - it limits a BOC's ability to market and sell the services of the BOC's section 272 affiliate during a particular time period, i.e., the period up until section 271 authorization is granted. Without that time restriction, a BOC would have been permitted to market and sell services of its section 272 affiliate (e.g., in-region interLATA services provided pursuant to section 271(g)(4)) immediately.

TRA and e.spire attempt to argue that section 274 shows that if Congress had intended to permit teaming under sections 271 and 272, it would have addressed teaming directly, as it did in section 274(c)(2).[7] Both, however, fail to recognize a significant difference between section 274 and sections 271 and 272. While section 274(a) prohibits a BOC from "engaging in the provision of electronic publishing that is disseminated by means of the [BOC's] . . . basic telephone service", similar to the interLATA prohibition in section 271, section 274(c)(1)(A) and (B) go on to specifically prohibit the BOC from carrying out "any promotion, marketing, sales, or advertising" relating to electronic publishing. There is no such prohibition of the carrying out of "promotion, marketing, sales or advertising" relating to interLATA services in sections 271 or 272, and thus no need for a provision similar to section 274(c)(2), which, as an explicit exception to section 274(c)(1), permits the BOC to engage in electronic publishing "teaming arrangements" with unaffiliated entities. The language of section 274 also highlights that Congress did not intend the word "provision" to encompass marketing activities. If it had, there would have been no need to include the marketing

[7] TRA Comments at p. 5; e.spire Comments at p. 7.

restrictions of section 274(c)(1) in the Act, since such activities would have been prohibited by section 274(a).

II. MARKETING ARRANGEMENTS DO NOT VIOLATE SECTIONS 271(a) AND 251(g)

MCI references a recent filing made by the Commission to suggest that the Commission agrees with MCI's interpretation.[8] [9] However, the language from the FCC Filing quoted by MCI, relating to the Commission's Alarm Monitoring Order,[10] does not provide the support that MCI would like to find there. The Commission was making an argument that there are issues to be resolved that can best be resolved by the Commission. It was not taking a position on those issues.[11]

MCI cited two statements by the Commission. First, the Commission stated that its Alarm Monitoring Order does not "necessarily stand for the general proposition that a BOC does not 'provide' services when it enters into a marketing agreement with a nonaffiliated company".[12] This statement is fully consistent with the Commission's ruling in the Alarm Monitoring Order, in which it said that it would examine marketing arrangements between BOCs and unaffiliated alarm service providers on a case by case basis to assure that the BOC did not become too intertwined in the

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[8] MCI Comments at pp. 11-12.

[9] Memorandum of Federal Communications Commission as Amicus Curiae in support of Primary Jurisdiction Referral (filed May 29, 1998), AT&T, et. al v. US West, No. C98-634 WD (W.D. Wash. Filed May 13, 1998)("FCC Filing").

[10] In the Matter of Implementation of Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824 (1997)("Alarm Monitoring Order").

[11] See, also, AT&T Corp. et al. v. Ameritech Corporation, No. 98 C 2993, slip op. at 9-10 (N. D. Ill., June 9, 1998) in which the District Court, in ruling on AT&T's request for a preliminary injunction, rejected similar claims by AT&T that the FCC had already expressed a view on the merits, stating that "interpreting the FCC's statement that this case presents 'substantial' and 'serious' questions as a ruling on the merits is an unfounded stretch."

[12] FCC Filing at p. 8.

business of the alarm monitoring provider.[13] This does not mean that the Commission has determined that all marketing arrangements are prohibited, just that some may go too far, and that each must be reviewed on its own facts. Second, the Commission stated that its Alarm Monitoring Order is "not determinative of the types of agreement's, if any, [that BOCs] may enter into with long distance companies under section 271." The Commission went on to say that "these are the very types of determinations that the Commission has not made, and should be allowed to make in the first instance."[14] In making those determinations, the Commission must act consistently with the language of the Act and the Commission's prior determinations on similar provisions of the Act. While the Alarm Monitoring Order may not be "determinative" with respect to interLATA service, that interpretation of similar language used by Congress in a similar context in the Act, cannot be ignored in interpreting section 271. It is a standard rule of statutory construction that similar language should be given a similar interpretation.[15] The Commission has an obligation to interpret similar provisions consistently unless Congress explicitly indicated a different intent. Congress indicated no such different intent here. The Commission held in the Alarm Monitoring Order that marketing arrangements are not per se "provision" of the underlying service, and that they must be evaluated on a case by case basis. A similar process is appropriate here.

Marketing arrangements between a BOC and an unaffiliated interexchange carrier ("IXC") can also satisfy the equal access requirements of section 271(g), just as

[13] Alarm Monitoring Order at ¶38.
[14] FCC Filing at p. 8.
[15] See, e.g., Curry v. Block, 541 F.Supp. 506, 518 (S. D. Ga. 1982).

the Commission suggested could occur when it stated in the Non-Accounting Safeguards Order that "any equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization. Thus, to the extent that BOCs align with non-affiliates, they must continue to do so on a nondiscriminatory basis".[16] The equal access requirements are satisfied in two ways. First, the BOCs must inform customers that they have a choice of IXCs, and must offer to read a list of available IXCs if the customer wants to hear the list.[17] Second, the BOC must make any teaming, or marketing, arrangement available to any IXC that wishes to participate.[18] This can be done both initially, e.g., in the form of an RFP such as Ameritech did, and subsequently by agreeing to enter into the same arrangement with other IXCs. There is no requirement to customize the arrangement to individual IXCs, or to assure that all IXCs like the terms and conditions, so long as all IXCs are offered the same terms and conditions.

III. COMMENTERS MISCHARACTERIZE THE AGREEMEENT BETWEEN AMERITECH AND QWEST

In order to bolster their arguments, many of the commenters mischaracterize the agreement between Ameritech and Qwest, which is included as an attachment to Ameritech's Motion to Dismiss. The commenters state variously that the agreement is exclusive, that Ameritech sets Qwest's interLATA prices, that Qwest is not

[16] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Dkt. No. 96-149, First Report and Order, 11 FCC Rcd 21905, ¶293 (1996) ("Non-Accounting Safeguards Order").

[17] Non-Accounting Safeguards Order, ¶292; In the Matter of Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In South Carolina, CC Dkt. No. 97-208, Memorandum Opinion and Order, FCC 97-418, ¶¶237-239 (released December 24, 1997).

[18] Of course, once section 271 authorization is obtained, the BOC may perform marketing and sales for its section 272 affiliate without offering to do the same for other IXCs. Non-Accounting Safeguards Order, ¶293; §272(g)(3).

permitted to change its prices, or market to customers of the arrangement, that there will be an inappropriate use of customer information by Ameritech, that Ameritech has a financial "stake" in Qwest's success, that Ameritech acts as the IXC, and that Ameritech may send a notice to customers at the end of the arrangement to shift the customers to Ameritech's long distance service.[19]

The comments relating to the agreement[20] are skewed to support the commenters' arguments, and do not reflect the agreement. Each of the concerns raised by the comments appear to be addressed by the agreement. By its stated terms, the agreement is nonexclusive. (§1.07) Each party is permitted to market as it sees fit to customers. (§1.06) Each party sets their own prices, and can change its prices. (§1.03) All use of customer information will be consistent with CPNI rules. (Att. A, §15) Ameritech will market Qwest's services, but customers will have a relationship with Qwest, and can call Qwest if they choose. (§1.02) The billing service provided to Qwest is the same as that provided to other IXCs. (§1.02; Att. A, §10) Ameritech receives compensation based on the number of sales it makes, not on Qwest's revenues. (§1.08) The letter sent upon termination of the arrangement must be approved by both parties. (§1.09)

The Commission will undoubtedly wish to examine the Qwest/Ameritech arrangement on its merits. When it does, the Commission should look to the terms of the

[19] See MCI Comments at pp. 5-8, 13-14; e.spire Comments at 3-6, 8-9; TRA Comments at 2-5, 7-8; McLeod Comments at 10-11; Time Warner Comments at 4-5.

[20] In some instances, it appears that the comments are directed toward the RFP, rather than the actual agreement. Such comments should be disregarded since they do not reflect the current factual situation.

agreement itself, and not to the slanted, misstated descriptions provided by many commenters.

IV. TEAMING ARRANGEMENTS ARE IN THE PUBLIC INTEREST

Several commenters suggest that teaming arrangements like that at issue here are not in the public interest because they remove the BOCs' incentive to open their local markets to competition.[21] These commenters are wrong on both counts. Such arrangements are in the public interest. They provide a marketing capability to IXCs that they might not otherwise have, especially smaller IXCs seeking to compete with the largest IXCs, making those IXCs more competitive and providing customers with more choices, and they satisfy a customer desire for one-stop shopping.

Nor do the BOCs have any less incentive to open their local markets to competition. First, the BOCs are legally obligated to comply with section 251, even if they never seek to enter the long distance markets. Second, these teaming arrangements allow BOCs to meet one customer need (that of one-stop shopping) while being compensated for the marketing service they perform, but they do not permit the BOCs to fully enter into and engage in all of the activities that constitute the provision of interLATA service, and they do not permit the BOCs to reap the benefits associated with being an interLATA service provider.

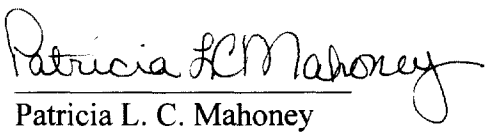
[21] See Time Warner Comments at pp. 5-6; e.spire Comments at pp. 2-3, McLeod Comments at pp. 3-5, 12.

V. CONCLUSION

The commenters supporting Sprint's petition do not provide a basis for the Commission to grant Sprint's petition. They attempt to continue the prohibitions of the MFJ, instead of looking to the provisions enacted by Congress. Their interpretation of section 271 is inconsistent with the language of the Act and with prior Commission interpretations of similar language. The Commission should reject the suggestions that all marketing arrangements between BOCs and unaffiliated IXCs violate sections 271(a) and 251(g). Instead, the Commission should adopt a standard similar to the standard that it adopted in the Alarm Monitoring Order, and should examine individual arrangements on a case by case basis.

Respectfully submitted,

SBC Communications Inc.



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CERTIFICATE OF SERVICE

I, Evelyn De Jesus, hereby certify that on this 19th day of June, 1998 a true and correct copy of the foregoing "COMMENTS OF SBC COMMUNICATIONS INC." in CC Docket 98-62 was sent by United States first class mail, postage prepaid, to the parties on the attached list.

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